



COUNCIL AGENDA: 5/19/15

ITEM: 3.4

Memorandum

TO: MAYOR AND CITY COUNCIL

FROM: Councilmember Ash Kalra
Councilmember Raul Peralez
Councilmember Chappie Jones

**SUBJECT: ACTIONS RELATED TO
THE AMENDMENT TO
TITLE 6 MEDICAL
MARIJUANA ORDINANCE**

DATE: 5/15/15

Approved

Date 5/15/15

RECOMMENDATION

- 1) That Council approve the creation of a Division of Marijuana Control headed by an Administrator to be appointed by and report to the City Manager.
- 2) That Council direct the City Manager to look closely at the Division of Gaming Control and the organizational structure in creating the Division of Marijuana Control.
- 3) That Council direct the City Manager to create a zero cost to the General Fund to operate the Division of Marijuana Control.
- 4) That Council direct the City Manager, in coordination with the City Attorney, to return to the Council for final adoption prior to October 2015.

OUTCOME

Approval of the proposed recommendations will create a Division of Marijuana Control that will be responsible for the day-to-day regulatory and administrative oversight of San José's marijuana dispensaries; provide a single source of information for the Council, Dispensaries and Public; provide an organization that will create the flexibility for the City to deal with the dynamic nature of the Marijuana Industry as it exists now and in the future; provide constant institutional knowledge and provide accountability within government for the public.

BACKGROUND

The purpose of these recommendations is to create a formal administrative office within the City Manager's Office for the ever-complicating oversight and regulation of the medical marijuana industry. For the benefit of the public and those who may be still researching the background of this issue in San José, the following provides some context. As stated in the City Manager's Office Memorandum dated April 15, 2015:

The City's history with Medical Marijuana dispensaries dates back nearly twenty years to November 5, 1996, when the voters of California approved Proposition 215, the Safe and Compassionate Use Act, commonly referred to as the 'Compassionate Use Act.' The Compassionate Use Act (CUA) provides an affirmative defense to individual patients and their primary caregivers, charged with criminal prosecution for the possession and cultivation of medical marijuana, and using marijuana for medicinal purposes.

The CUA defines a "patient" as a "seriously ill" person whose use of marijuana: "...has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Health & Safety Code § 11362.5(d)) A "primary caregiver" is defined as the "individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." (Health & Safety Code §11362.5(e)) The CUA did not regulate the cultivation, manufacturing, transporting, or dispensing of medical marijuana within the state.

In 1998, following the passage of Proposition 215, the Council approved zoning regulations for dispensaries and charged the Police Department, Narcotics Division, with overseeing dispensary operations. However, federal enforcement of federal drug regulations ended medical marijuana distribution in San José and the medical marijuana zoning regulations were not included in the comprehensive update of the Zoning Ordinance adopted by the Council in February 2001.

On October 12, 2003, Governor Gray Davis signed into law Senate Bill 420 known as the Medical Marijuana Program Act (MMPA). The MMPA expanded on the CUA by permitting qualified patients and primary caregivers to join together and collectively cultivate medical marijuana. The bill also provided clarity around the definition of "serious medical condition,"¹ as well as the quantity of marijuana and number of plants a qualified patient or primary caregiver could possess.² Specifically, the MMPA provided: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions..." (Health & Safety Code § 11362.775)

On February 2007, the California State Board of Equalization notified dispensaries that they were required to pay sales tax and obtain a seller's permit to dispense medical marijuana in California.³

On August 2008, the California Attorney General issued "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use"⁴ to clarify existing state law. At this time, there were no dispensaries operating in San José.

¹ SB 420 defined serious medical condition as:

"all of the following medical conditions: (1) Acquired immune deficiency syndrome (AIDS); (2) Anorexia; (3) Arthritis; (4) Cachexia; (5) Cancer; (6) Chronic pain; (7) Glaucoma; (8) Migraine; (9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis; (10) Seizures, including, but not limited to, seizures associated with epilepsy; (11) Severe nausea; (12) Any other chronic or persistent medical symptom that either:

(A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).

(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

² SB 420 authorized a qualified patient or primary caregiver to possess no more than eight ounces of dried marijuana and no more than six mature plants or 12 immature plants per qualified patient.

³ <http://boe.ca.gov/news/pdf/medseller2007.pdf>

⁴ http://oag.ca.gov/system/files/attachments/press_releases/n1601_medicalmarijuanaguidelines.pdf

On October 19, 2009, the U.S. Attorney General issued a memorandum that outlined priorities for marijuana investigations and prosecutions.⁵ The memorandum was addressed to federal prosecutors in states that enacted laws authorizing the medical use of marijuana. While declaring his commitment to the enforcement of the Controlled Substances Act (“CSA”), the federal U.S. drug policy under which the manufacture, importation, possession, use and distribution of certain substances is regulated, the U.S. Attorney General stated that the Department was “committed to making efficient and rational use of its limited investigative and prosecutorial resources” and that as a general matter, pursuit of significant traffickers of illegal drugs should not focus federal resources on individuals whose actions are in “clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”

At the same time, however, the U.S. Attorney General stated that prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.

When the U.S. Attorney General issued his memorandum, dispensaries were not legal in the City. Nevertheless, following the release of the memorandum and faced with extreme fiscal challenges and a lack of resources for enforcement, the City experienced a proliferation of dispensaries in San José. By early 2010, staff from the City’s Code Enforcement Division had received and investigated complaints of seven (7) dispensaries operating illegally in the City and by March 2010, staff had mailed letters to seventeen (17) businesses suspected of operating as dispensaries to inform them they were operating in violation of the City’s Code.

In response, on March 30, 2010, the Council requested staff bring forward a draft ordinance establishing regulations for the control and taxation of medical marijuana establishments. By August 2010, the number of dispensaries had increased to fifty-seven (57) and on August 3, 2010, the Council voted to place Measure U, the Marijuana Business Tax (MBT), on the November 2010 ballot. Measure U authorized a gross receipts tax of up to 10 percent on all marijuana transactions, medicinal or otherwise, legal or illegal. On the California ballot that November 2010, was California State Proposition 19, which would have legalized marijuana in the state. Measure U passed in San José while Proposition 19 failed statewide.

On September 13, 2011, after years of community outreach and hearings, the Council adopted a medical marijuana land use ordinance and a medical marijuana regulatory ordinance. However, on October 28, 2011, medical marijuana advocates filed a “Petition for Referendum” challenging the regulatory ordinance and forced the Council to either repeal the regulatory ordinance or put it to a vote of San José residents. The Council chose to repeal the ordinance and to suspend the land use ordinance, as the two were intended to work in tandem. At this time, more than 100 collectives were operating in San José. None of them were legal. Faced with limited resources, the absence of medical marijuana regulations and over 100 dispensaries operating illegally in the City, on February 14, 2012, the Council directed staff to deploy the limited City enforcement resources on dispensaries that: 1. Operated in a manner that created a public nuisance; 2. Failed to pay the Marijuana Business Tax; or 3. Located too close to schools in violation of state law.

On May 6, 2013, the California Supreme Court decided the case of *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* and confirmed local governments’ land use authority to regulate or ban dispensaries.

⁵ <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>

On September 10, 2013, the Council deemed medical marijuana regulation to, again, be a top ten priority, and directed the Administration to explore expanding enforcement and to return to the Council with new regulations.

On December 10, 2013, Council approved expanding the enforcement priorities established on February 14, 2012 to include dispensaries operating:

- Within 1,000 feet of public and private schools, child daycare centers, churches with daycare centers, community/recreation centers, parks, libraries, and other medical marijuana establishments;
- Within 500 feet from substance abuse rehabilitation centers; or
- Within 150 feet from residential uses.

Council also directed staff to take immediate enforcement action against dispensaries sharing a “zero lot line” with a residential use.

On June 10, 2014, as detailed above, the Council adopted the Land Use Ordinance and the Regulatory Ordinance. Together, these ordinances make up the City’s Medical Marijuana Program.

On December 2015 we will be faced with a locally “certified” Industry centered on a federally controlled substance with no State regulatory mechanism. As a City we saw what happened in 2011 without robust regulation and the existence of over 100 dispensaries and the corresponding threat to the Health, Safety and General Well Being of our Citizens. In 2016 it is highly likely to anticipate a Statewide Initiative legalizing marijuana use for adults.”

Almost 16 years ago in May of 1999 former Mayor Gonzales and Councilmembers Frank Fiscalini, Manny Diaz, John Diquisto and Alice Woody called for the creation of the Division of Gaming Control (DoGC) when they felt that the State Gaming regulations were inadequate for robust regulation demanded by our citizens. In the case of Medical Marijuana, the State regulations are completely lacking and creating a Division of Marijuana Control not only to regulate the current market but whatever voters may pass in 2016 not only makes sense, but, seems essential. I would proposed that the City Manager look closely at the DoGC and model its self-funding by table fees as the Division of Marijuana Control can do and be zero cost to the General Fund and paid for entirely from the annual dispensary fees assessed. Also the City Manager can look at the DoGC model organizational structure with a single administrator or specialist in the field and as in the DoGC the existence of Police staff for enforcement, Finance staff for revenue intake and accountability and Code Enforcement staff for code compliance.

The City of San José has always been a leader when it comes to good public policy and it is our belief that we need to be ahead of the curve when it comes to regulation of this industry, not only for the well-being of the City, but also as a capable consistent source of information and guidance for those Marijuana Dispensaries that will be in full compliance and continuing operation beyond December of this year and their patients.